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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1075

JACOB FERSHTMAN, HAROLD SIEGEL, ISABEL WEST, ZITA GARFIELD, LARRY SOMMA, HYMAN FREYDBERG, RENA KLEIN, JACOB KRIVILOFF, AGNES SHOEMAKER, as Executrix of the Estate of ROBERT SHOEMAKER, individually and as Limited Partners of PENN ASSOCIATES, a New York Limited Partnership,

Petitioners,

–against–

HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 461 8TH AVENUE CORPORATION, ROSE W. GROSS, as Executrix of the Estate of SIMEON F. GROSS and ELLIOT S. GROSS, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross", ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, ELLIOT S. GROSS and ARTHUR YOUNG & COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLES OF CONTENTS

	Page
Table of Authorities	i
Questions Presented	1
Statement of the Case	2
A. Jurisdiction and Parties	2
B. The Facts	3
Argument—Reasons For Denying The Writ	8
I. The Court Below Did Not Err In Dismissing The Complaint	8
II. There Is No Conflict Between The Decision of The Court of Appeals And Any Applicable Decision of This Court	14
III. There Is No Conflict Between The Decision Appealed From And The Decision of The Court of Appeals for The Seventh Circuit	16
IV. The Purchaser-Seller Restriction Was Not Applied in This Proceeding	17
Conclusion	18
Appendix A	1a
Appendix B	17a

Table of Authorities

Cases	Page
Adair V. Schneider, 293 F. Supp. 393 (S.D.N.Y. 1968)	9, 12
Allico National Corp. v. Amalgamated Meat Cutters & Butcher W., 397 F.2d 727 (7th Cir., 1968)	16
Barnett v. Anaconda Company, 238 F. Supp. 766 (S.D.N.Y. 1965)	12
Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2nd Cir., 1952), cert. den. 343 U.S. 956 (1952)	17
Bound Brook Water Company v. Jaffe, 284 F. Supp. 702 (D.N.J. 1968)	9
Estate Counseling Service v. Merrill Lynch, Pierce, etc., 303 F.2d 527 (10th Cir., 1962)	8, 9
Hirsh v. Merrill Lynch Pierce Fenner & Smith, Inc., CCH Federal Securities Law Reporter ¶ 92, 616 (S.D.N.Y. 68 Civ. 5183, decided March 20, 1970)	9
Hoover v. Allen, 241 F.Supp. 213 (S.D.N.Y. 1965)	9
Janigan v. Taylor, 344 F.2d 781 (1st Cir., 1965), cert. den. 382 U.S. 879 (1965)	8
Lester v. Preco Industries, Inc., 282 F. Supp. 459 (S.D.N.Y. 1965)	9
Levine v. Seilon, 439 F.2d 328 (2d Cir., March 1, 1971)	12
List v. Fashion Park, Inc., 340 F.2d 457 (2d Cir., 1965)	11
Mutual Shares Corporation v. Genesco, Inc., 384 F.2d 540 (2d Cir. 1967)	10

Ryan v. J. Walter Thompson Company, 322 F. Supp. 307 (S.D.N.Y. Jan. 29, 1971) 12

Supt. of Insurance v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) 10, 14, 15

West v. Zurhorst, 280 F.Supp. 574 (S.D.N.Y. 1967) 9

Statutes and Regulations

Securities Act of 1933, Section 12 (2) 15 U.S.C. § 77-1(2) 2

Securities Act of 1933, Section 17(a), 15 U.S.C. § 77-q(a) 1, 2, 8,

Securities Act of 1933, Section 22(a), 15 U.S.C. § 77-v 2

Securities Exchange Act of 1934 Section 10(b), 15 U.S.C. § 78-j(b) 1, 2, 8, 10, 12, 14, 15, 16,

Securities Exchange Act of 1934 Section 27, 15 U.S.C. § 78-aa 2

Rule 10-b-5 of the Securities and Exchange Commission 17 CFR Section 240. 10-b-5 ..... 1, 2, 8, 10, 12, 16

Supreme Court Rules, Rule 23(1) (e) 3

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully pray that no writ of certiorari issue in this proceeding. The petition for a writ of certiorari was received by respondents February 22, 1972.

QUESTIONS PRESENTED

1. When plaintiffs base federal jurisdiction on § 17(a) of the Securities Act of 1933 and § 10(b) and Rule 10-b-5 of the Securities Exchange Act of 1934 and allege in their complaint that they were induced to purchase limited partnership interests by means of misrepresentations, but do not allege any damage to them resulting from such purchases, was the Court below in error in affirming the dismissal of the complaint for want of federal jurisdiction?

2. When the general partners of a limited partnership terminated the interests of the limited partners unilaterally and pursuant to an absolute power to terminate such interests in their sole discretion contained in the agreement of limited

partnership entered into by the limited partners and the general partners twelve years prior to the termination, was the Court below in error in affirming the dismissal of the complaint for want of federal jurisdiction on the ground that the termination did not violate § 10(b) and the Securities Exchange Act of 1934 or Rule 10-b-5 thereunder?

STATEMENT OF THE CASE

A. Jurisdiction and Parties

This is an action purportedly brought under § 22(a) of the Securities Act of 1933 and § 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 77-v and § 78-aa) in that the claim is alleged to arise under Section 12(2) and 17(a) of the 1933 Act and Section 10(b) of the 1934 Act and Rule 10-b-5 promulgated thereunder. No other basis for federal jurisdiction is alleged in the complaint., Petitioners have apparently abandoned their allegation that Section 12(2) of the Securities Act of 1933 was breached by defendants. The texts of § 17(a) and § 10(b) and Rule 10-b-5 are set forth at pages 3-5 of the petition for certiorari.

The "securities" in question are limited partnership interests in Penn Associates, sold to petitioners in 1956, in connection with which certain misrepresentations were allegedly made. Petitioners purported to sue as limited partners which they allege in ¶ "5" of the complaint (Appendix, 3a) they now are, and derivatively on behalf of Penn Associates. The complaint is annexed hereto as Appendix A and appears at pages 1a-16a of the Appendix, *infra*.

Petitioners state to this Court (Petition, p. 6) that they seek to recover $2,000,000 "compensatory damages" herein. In the ad damnum clause of the complaint the same $2,000,000 appears as "compensatory and punitive damages" (Appendix, 15a) but it appears in ¶ 37 of the complaint that the $2,000,000 is solely "punitive damages". (Appendix, 15a). The Court of Appeals referred to this $2,000,000 as "a figure seemingly plucked from the atmosphere . . .". (Petitioners' Appendix, 5a)

B. The Facts

Rule 23(1)(c) of the Rules of this Court directs that the petition contain "a precise statement of the case containing the facts material to the consideration of the questions presented." Since the question presented to this Court is whether the Court of Appeals, whose decision petitioners seek to review, was in error in affirming the dismissal of the complaint for failure to state a federal claim for relief, the "facts" set forth in the petition which purport to describe the formation of the limited partnership, the execution of the limited partnership agreement and what petitioners discovered on deposition in the "Kaine" action are clearly irrelevant since these "facts" nowhere appear in the complaint that was dismissed.

However, even were these "facts" part of the complaint and assuming contrary to fact that they were true, they do not state a claim for relief for violation of federal securities laws and the complaint was properly dismissed.

Petitioners herein and plaintiffs in the "Kaine" action, referred to at page 10 of the petition (in which jurisdiction was based solely on diversity) claim to be limited partners of a partnership known as Penn Associates which was formed in 1956 to manage the leasehold of premises known as 461 8th Avenue. The leasehold was owned by the respondent corporation. The respondents Herman J. Scheetman, Sidney P. Scheetman, John D. Bussel, Henry Spellman and George Zuckerman were the general partners of Penn Associates and the shareholders of the respondent corporation and were, at all times, the beneficial owners of the stock of the defendant corporation.

The limited partnership agreement of Penn Associates dated May 4, 1956, a copy of which is annexed to the complaint in this action and appears in the appendix hereto as Appendix B at pages 17a-34a provides in ¶ 6 thereof for the termination of the partnership on the 30th day of November, 1971, unless *sooner* terminated by either a sale of the leasehold or the repayment of the contributions of the limited partners in full (Appendix, 21a). Such repayment could, pursuant to ¶ 8,

be made, at any time in the sole discretion of the general partners (Appendix, 21a). The agreement further provided in ¶ 13 thereof that the leasehold could be extended beyond November 30, 1971, the then termination date, but that such renewal or extension would not extend the life of the limited partnership past the time set for termination in ¶ 6 of the agreement, that is in all events not beyond November 30, 1971 (Appendix, 24a). In the face of petitioners' efforts to skirt ¶ 13, the Court of Appeals found this provision to be "pellucid". (Petitioners' Appendix, p. 9a, fn. 1.)

Paragraph 9 of the partnership agreement provides a schedule for the repayment of the capital contributions of the limited partners during the term of the agreement and upon its expiration (Appendix, 21a-22a). Paragraph 11 of the agreement provides that the *net profits* of the partnership would be divided ratably among the limited partners at the rate of 12% per annum of the then outstanding balance of the capital contribution of each limited partner (Appendix, 23a). Net profits are defined in ¶ 10 to mean the excess of gross receipts over the acquisition, operating and other expenses of the partnership. Partnership expenses include, but are not limited to, amortization, maintenance, repairs and replacement (Appendix, 22a-23a). All the net profits after the distribution to the limited partners of a 12% return on their outstanding capital belong *solely* to the general partners with the limitation that in addition to their 12% interest, the limited partners should share in 25% of the amount of rent actually collected from premises 461 8th Avenue in excess of $815,000 a year (Appendix, 23a). Nowhere in the complaint do petitioners allege that they did not receive their 12% return or their share of the rent at any time during the life of the partnership.

The limited partners enjoyed a most profitable experience. For the 11 years and 11 months during which the limited partnership continued, they received an average return of some 18% per annum on their outstanding capital (Petitioners' Appendix, p. 4a).

Paragraph 15 of the agreement (Appendix, 25a) gives to the general partners the absolute right to mortgage or pledge the

assets of the partnership for their own capital contribution in an amount not to exceed $300,000.

Pursuant to the rights afforded them in the partnership agreement, the corporate defendant and the general partners did negotiate an extension of the lease and the general partners did elect to terminate the limited partnership and to return to the limited partners their capital contribution in full.

The petition (pp. 7-8) attempts to make it appear that the execution of the limited partnership agreement was a hurried affair. None of these "facts" appears in the complaint, none is relevant to the issues on appeal, and respondents will not argue these matters of "fact".

The limited partners of Penn Associates made their investment primarily on the basis of favorable experience with the general partners in past investments. Far from being defrauded, the limited partners received an average annual return of 18% on their capital investment outstanding. Mr. Kaine was given by Mr. Schectman not only the pertinent figures relating to the investment but invited to examine the property for himself.

No representations were made to any limited partner that the general partners had cash to put into the venture. The partnership agreement, ¶ 15 (Appendix, 25a) clearly presumes that the general partners would borrow the funds for their investment.

The letter of Sidney Schectman, referred to at page 9 of the petition and reprinted in petitioners' appendix at 19a-20a, was written after the limited partnership agreement was signed and did not vary the clear provisions of that written agreement. On its face, it is apparent from the letter that Mr. Kaine had raised with Mr. Schectman at most a question of the meaning of ¶ 8 of the Certificate of Limited Partnership of Penn Associates, not of the limited partnership agreement. The letter correctly states that the partnership agreement controls, rather than the certificate, but then proceeds to give an erroneous interpretation of ¶ 8 of the limited partnership agreement, an interpretation the Court of Appeals found "manifestly wrong".

(Petitioners' Appendix, 7a) (Petitioners' truncated quotation from the letter at page 9 of the petition attempts to give the impression that Mr. Scheetman was personally assuring Mr. Kaine as to the termination of the agreement but a reading of the letter shows he was only passing on verbatim an erroneous interpretation by his then counsel of a paragraph of the agreement.) In fact, ¶ 8 of the partnership agreement clearly states that the general partners may at any time return to the limited partners their capital, provided that such return be pro rata, except that the pro rata distribution does not apply if ¶ 14 of the limited partnership agreement, which deals with sale of the leasehold, comes into effect, as it never did.

Petitioners indicate that the "Kaine" action was precipitated by counsel's discovery that the general partners had extended the lease. There was, of course, no reason to tell the limited partners the lease had been extended. By the terms of ¶ 13 of the partnership agreement, which the Court of Appeals found pellucid, the extension of the lease did not extend the life of the limited partnership.

The "undisclosed facts" supposedly ascertained on deposition in the "Kaine" action (Petition, p. 10, et seq.) are either untrue or immaterial or, if true, were known to petitioners for some time.

The termination of the limited partnership was accomplished by the letter to the limited partners dated March 29, 1968. The general partners could continue as a general partnership but the limited partnership had been terminated. The complaint makes no mention of this "undisclosed" fact allegedly learned in the "Kaine" proceeding.

The release of the parking lot and the very minor rent decline resulting was within the prerogative of the general partners as managers (Agreement, ¶ 20) (Appendix, 26a-27a). The general partners did not guarantee the limited partners any specific amount of excess rent but merely gave them a right to share in excess rent "actually collected". (Agreement, ¶ 11) (Appendix, 23a). In the event of a modification of the rent, the general partners personally guaranteed the limited partners their

return of 12% on outstanding capital (Agreement, ¶ 13) (Appendix, 24a). Again, one would search the complaint in vain for mention of a parking lot.

The general partners did not undertake to sell the lease but to share in capital gains if such sale was made before November 30, 1971, an event which never occurred. The agreement (¶ 18) (Appendix, 24a) clearly provided that an extended lease would belong to the general partners after the termination of the limited partnership.

That title to the lease was taken by the corporation appears in ¶ "7" of the "Kaine" complaint, part of the record herein, and was not a fact discovered on examination. It was never intended that the corporation be an asset of the partnership. The record herein shows that the stock of the corporation was held for the general partners who were the beneficial owners thereof. Petitioners so allege in ¶¶ 17 through 20 of their complaint (Appendix, 5a-7a).

The operating agreement between respondent corporation and the partnership was attached to, and made a part of, the limited partnership agreement. The general partners did not "siphon" the tax benefits of amortization and leasehold improvements to the corporation. Rather these benefits belonged to the general partners as did the net income of the partnership over the 12% return to the limited partners and their interest in excess rent. It was of little importance to the limited partners if the income and deductions undoubtedly belonging to the general partners were taken by them through the medium of the corporation.

The limited partners contracted to receive a 12% return on their investment from "net profits" and to share in excess rent (¶ 11). Net profits mean gross receipts after expenses, which expenses include amortization and the costs of repairs and replacements (¶ 10; Appendix, 22a-23a). Thus, the partnership agreement is clear that amortization and improvement tax benefits belong to the general partners as does any income to which the limited partners are not contractually entitled.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. The Court Below Did Not Err In Dismissing The Complaint

Petitioners allege that jurisdiction of this action arises under § 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10-b-5 promulgated thereunder. No other basis for federal jurisdiction is claimed.

Respondents moved to dismiss the complaint on the grounds that the federal courts lacked jurisdiction and that the complaint failed to state a claim for relief. Petitioners attempted to come within the jurisdiction of the federal courts by alleging respondents sold them securities by means of misrepresentations and omissions contrary to the Securities Act of 1933 and the Securities Exchange Act of 1934. However, the complaint shows no damage to petitioners arising from these sales. Rather, any damage claimed comes from the alleged subsequent breach of fiduciary duty by respondents, unconnected with, and not a consequence of, the purchase or sale of securities. Lacking damages arising from the purchase or sale of securities, no claim for relief is pleaded under the sections of the securities laws cited by petitioners and no claim is alleged under any other federal law. Hence, there is no basis for the jurisdiction of the federal courts and the complaint was properly dismissed.

Petitioners did not plead that the securities they purchased were worth less than they paid for them at the time of purchase or thereafter or that they disposed of them at a loss. As to claims under any of the sections cited by petitioners for inducing purchase of stock by fraud, damages are measured by the out-of-pocket rule. *Estate Counseling Service v. Merrill Lynch, Pierce, etc.*, 303 F.2d 527 (10th Cir. 1962). For one induced to purchase securities by fraud, damages are solely the difference between the real value of the securities and the price paid, with interest and outlays legitimately attributable to defendants' conduct, but not damages covering the expected fruits of unrealized speculation. *Janigan v. Taylor*, 344 F.2d 781 (1st

Cir. 1965), cert. den. 382 U.S. 879 (1965); *West v. Zurhorst*, 280 F.Supp. 574 (S.D. N.Y. 1967). A failure to show such damages is a fatal defect. *Estate Counseling Service v. Merrill Lynch, supra*. In the instant case, not only do petitioners fail to allege damages from the purchase of the limited partnership interests, but it appears from the record and the Court of Appeals noted that petitioners received back their capital and an average return of some 18%.

The alleged violation of the Securities Acts must be the cause of the damage claimed or no claim for relief is pleaded under such acts. *Hoover v. Allen*, 241 F.Supp. 213 (S.D. N.Y. 1965). If the complaint fails to specify adequately a causal relation between the violation and the alleged damage no claim is pleaded. *Bound Brook Water Company v. Jaffe*, 284 F.Supp. 702 (D.N.J. 1968). Causation of damages is part of a private claim for relief for violation of the Securities Acts and cannot be read out of such claim. *Adair v. Schneider*, 293 F.Supp. 393 (S.D.N.Y. 1968); *West v. Zurhorst, supra; Hirsh v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, CCH Federal Securities Law Reporter Para. 92,616 (S.D.N.Y. 68 Civ.5183, decided March 20, 1970).

Plaintiffs in *Lester v. Preco Industries, Inc.*, 282 F.Supp. 459 (S.D.N.Y. 1965), alleged that in connection with the sale of securities defendants planned to and did commit acts of waste, siphon off corporate assets and so forth. The District Court said of this:

> "Every one of these allegations is a typical, common law charge of breach of fiduciary duty in the management of a corporation, and is not normally covered by the securities laws. Howard v. Furst, 238 F.2d 790 (2d Cir. 1956); Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952). The sale of the securities is only incidental to a major mismanagement issue. See Pettit v. American Stock Exchange, 217 F.Supp. 21, 25 (S.D.N.Y. 1963). Each item complained of occurred after the filing of the registration statement and the issuance of the prospectus and the sale of the stock.
>
> "The question presented to this Court, then, boils down to whether allegations of evil intent, purportedly

> entertained when the registration statement was filed but not carried out until a subsequent time, are sufficient to convert what would otherwise be a stockholders derivative suit into a suit for violation of the 1934 Act. It is the conclusion of this Court that they are not." 282 F.Supp. at 462.

In *Mutual Shares Corporation v. Genesco, Inc.*, 384 F.2d 540 (2d Cir. 1967), the Court of Appeals for the Second Circuit said:

> "Finally, any stockholder could plausibly argue that at the time of purchase he relied on an implied representation by management not to mismanage. Therefore, as the Commission's *amicus* brief points out, if plaintiffs' proposition were accepted, it would convert any instance of corporate mismanagement into a Rule 10b-5 case." 384 F.2d at 545.

Recently, in *Supt. of Insurance v. Bankers Life & Cas. Co.*, 404 U.S.6 (1971), this Court stated:

> "We agree that Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." 404 U.S. at 12

It would appear that petitioners are now admitting that they have pleaded no claim in connection with their purchase of limited partnership interests for their petition more or less ignores these purchases. Instead, the claim is made that when the general partners repaid to the limited partners their capital invested, a "forced sale" of securities was made in violation of § 10(b) and Rule 10-b-5. This would appear to be an afterthought of petitioners; there is no allegation of "sale", forced or otherwise, in the complaint.

It is significant that ¶¶ 22, 24, and 25 of the complaint which attempt to allege schemes to defraud, material misrepresentations and omissions in the language of the Securities statutes, allege such schemes, misrepresentations and omissions only in connection with the purchase by the limited partners of their interest in Penn Associates. One would search the complaint in vain for an allegation that the "sales" were made by means of interstate commerce or the mails. It appears both

in the complaint (Appendix, 12a-13a), and, in the partnership agreement annexed to the complaint (Appendix, 21a) that the termination of the partnership was made pursuant to the power to terminate given the general partners by ¶ 8 of the partnership agreement.

It should be noted that petitioners in their complaint (¶¶ 3 and 5) allege that they are now limited partners of Penn Associates. They take the position that the termination of their limited partnership interests was null and void (Complaint, ¶ 34). Hence, according to their own complaint, there has been no sale of their interest and no resulting damages.

However, even if a forced sale occurred, petitioners' complaint still fails to state a claim for relief. It appears in the complaint (¶¶ 28, 29) and from the notification of termination (Petition, p. 16) that the termination of the limited partnership interests was "unilateral" and based solely upon the right given to the general partners by the partnership agreement to repay the limited partners. Hence, even assuming there was non-disclosure or misrepresentation in connection with these sales, there was neither reliance on the deception by the petitioners or the other limited partners nor causation of damage by the deception.

The Court of Appeals for the Second Circuit ruled in *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir. 1965):

> "Disagreement centers on the applicability and meaning of the requirement that reliance be placed upon the misrepresentation. Our examination of the authorities satisfies us that this requirement also is carried over into civil suits under Rule 10b-5.***
>
> "This interpretation of Rule 10b-5 is a reasonable one, for the aim of the rule in cases such as this is to qualify, as between insiders and outsiders, the doctrine of *caveat emptor*—not to establish a scheme of investors' insurance. Assuredly, to abandon the requirement of reliance would be to facilitate outsiders' proof of insiders' fraud, and to that extent the interpretation for which plaintiff contends might advance the purposes of Rule 10b-5. *But this strikes us as an inadequate reason*

> *for reading out of the rule so basic an element of tort law as the principle of causation in fact.*" (Emphasis supplied)

Respondents did not induce petitioners or other limited partners to sell their interests to them because no inducement was necessary. Respondents acted pursuant to the rights given them by ¶ 6 and ¶ 8 of the partnership agreement to pay off the limited partners and they did not need the consent of any of the limited partners to do so. If respondents had deceived the limited partners in connection with the return to them of their capital, the limited partners nonetheless could not have relied on that deception to their harm because they had no choice except to be paid back. Paragraph 8 of the limited partnership agreement is clear that the limited partners could have their capital returned to them by the general partners "at any time, in the sole discretion of the General Partners" (Appendix, 21a).

When, as in the instant case, the defendants could consummate the purchase by them of the limited partnership interest regardless of what the limited partners did, the alleged "deception" could not cause the damages claimed and thus no claim is stated under § 10(b) or Rule 10-b-5. *Barnett v. Anaconda Company*, 238 F.Supp. 766 (S.D.N.Y. 1965); *Adair v. Schneider*, 293 F.Supp. 393 (S.D.N.Y. 1968); *Ryan v. J. Walter Thompson Company*, 322 F.Supp. 307 (S.D.N.Y. Jan. 29, 1971).

In *Levine v. Seilon*, 439 F.2d 328 (2d Cir., March 1, 1971), the Court of Appeals for the Second Circuit upheld the dismissal of a complaint under 10(b) where no causal relation was shown between the misrepresentation and any action by the plaintiff. That Court said in relevant part:

> "It is hardly realistic to accuse a corporation of having secured an unjustified windfall or enrichment as a result of a redemption which was legally and financially within its power to effectuate quite independently of any action by the shareholders whose stock was redeemed." 439 F.2d at 334.

Petitioners contend that respondents do not have the right to repay their capital before the expiration of the lease. As

stated above, if this were true, they made no sale to respondents and suffered no damages thereby. However, the limited partnership agreement is clear that the general partners had such a right. Paragraph 8 of that agreement reads (Appendix, 21a):

> "8. The contributions of the Limited Partners to the capital of the partnership may be returned to them in whole, or in part, at any time, in the sole discretion of the General Partners, provided that all repayments of capital shall be pro rata among all the Limited Partners, subject to the provisions of paragraph 14."

Paragraph 14 of the agreement reads (Appendix, 24a-25a):

> "14. In the event that the agreement dated the 4th day of May, 1956 between 461-8th AVENUE CORPORATION and partnership is cancelled by reason of the sale of the leasehold on the office building, then the Limited Partners shall be entitled to receive the following sums:
>
> (a) Return of balance of capital contribution; and
>
> (b) Twelve (12%) percent interest on such balance to be computed from the commencement of the current fiscal year, or the date of the most recent profit distribution, whichever period is shorter; and
>
> (c) Ratable portion of the capital gain realized upon such sale on the proportion that the original capital contribution of each bears to SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS."

Clearly, ¶ 14 modifies only that part of ¶ 8 which provides for a pro rata distribution and that only in the event of a sale of the lease which never occurred.

If there were any discrepancies between petitioners' understanding and the written partnership agreement, petitioners had more than a decade to read this short agreement and ask for reformation. If for some reason the general partners do not have the right to return the limited partners' capital to them, then, as the court below said, "All that they have is a claim for reformation based on state law" (Petitioners' Appendix, p. 8a).

II. There Is No Conflict Between the Decision of the Court of Appeals and Any Applicable Decision of This Court

Petitioners assert that the decision of the Court of Appeals herein is in conflict with the decision of this Court in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971). In the latter case, this Court reversed a decision of the Court of Appeals for the Second Circuit and found a claim had been stated under § 10(b). However, the basis of the decision of the Court of Appeals reversed in *Superintendent of Insurance* so differs from the basis of that Court's decision herein as to demonstrate there is no conflict between the decisions.

The decision of the Court of Appeals herein is not founded upon a narrow interpretation of the Securities Acts nor upon a theory that such acts apply only to the "garden type variety of fraud". Neither was the opinion herein based in any way upon the fact that the securities involved were not traded in the market. Rather, the Court of Appeals found that petitioners had not shown that they were damaged by a purchase or sale of securities in connection with which any deceptive device or fraud was used. Hence, petitioners lacked a federal claim for relief and the complaint was properly dismissed.

Petitioners show no damage to them from their purchase of the limited partnership interests in 1956. Rather, they have reaped large profits from these purchases. No deception or fraud in connection with the sale of these interests in 1968 could have affected them. If respondents had, under the limited partnership agreement, the right to terminate the limited partnership unilaterally and in their sole discretion, whatever information petitioners might receive could not change the fact that under the agreement they signed they had no choice but to accept the termination of their interests at the price set forth in the partnership agreement. If, on the other hand, respondents did not have the right to terminate the limited partners' interests, then the limited partners retained such interests, made no sale, and suffered no damage.

Thus, the instant case is fully in conformity with *Superintendent of Insurance v. Bankers Life & Casualty Co., supra.* The corporation which plaintiff therein represented was a seller of securities upon which a manipulative device had been used in connection with the sale and which had suffered damages through such sale as an investor. The Court of Appeals in that case had based its decision upholding the dismissal of the complaint on two erroneous conclusions: that no *investor* was injured, and that § 10(b) was limited to preserving the integrity of the securities market. Neither conclusion entered into the Court's decision in this action. Plaintiff in *Superintendent of Insurance* was injured by a sale in which deception was used. Petitioners herein were not injured by deception because the sale was pursuant to a contractual right of redemption which gave petitioners no alternative but to have their interests redeemed at a specified price.

Petitioners accuse the Court of Appeals herein of going outside the record in finding that an attorney's interpretation of ¶ "8" of the limited partnership agreement was "manifestly wrong". The agreement, however, is part of the record and it takes only a simple reading of ¶¶ 6, 8 and 14 of the agreement to allow a Court to determine the attorney had misread it. As shown at pages 12-13, *supra*, the agreement is clear that the general partners may return their capital to the limited partners at any time in their sole discretion subject only to the proviso that in the event of a sale before termination of the agreement, an event which never occurred, the limited partners shared in any capital gain.

The declaration of termination was not misleading. Respondents acted and purported to act in accord with the agreement, a document as available to petitioner as to respondents. The lease extension was irrelevant to respondents' right to repay the limited partners because under the terms of the agreement no extension of the lease extended the life of the limited partnership. There was no obligation under the contract to turn the lease to capital gain; rather, the agreement provided for exactly what happened, an extension of the lease and the repayment of the limited partners' shares.

There is no conflict between the decision of the Court below and any decision of this Court or of another panel of the Court of Appeals. No genuine question is raised as to the scope of § 10(b) or Rule 10-b-5. Rather, the decision below accords with the decisions of this Court and of the lower federal courts and no question for resolution by this Court is presented by this petition.

III. There Is No Conflict Between the Decision Appealed From and the Decision of the Court of Appeals for the Seventh Circuit

Petitioners claim that the decision of the Court below is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Allico National Corp. v. Amalgamated Meat Cutters & Butcher W.*, 397 F.2d 727 (7th Cir., 1968). However, the facts in the two proceedings and the bases for the decisions so differ that there is no inconsistency between the Courts shown by these cases.

Defendants in *Allico* had breached a contract with plaintiffs. Defendants herein did not breach a contract but acted pursuant to their written agreement with petitioners. Moreover, the Court in *Allico* did not find that a breach of contract was a sufficient basis for a claim under § 10(b) or Rule 10-b-5. Rather, it stated "that this is not solely a dispute in good faith over the existence or interpretation of contractual obligations and performance thereof." 397 F.2d 729. In the instant case whether there is a contractual obligation of respondents based upon the letter to Kaine is the sole dispute herein.

Plaintiffs in *Allico* alleged a wrongful conversion of their securities by defendant's conduct in connection with the purchase and sale of securities. Plaintiffs in *Allico* also alleged damage to them from defendant's wrong in connection with a securities transaction. Here, petitioners suffered no damage in connection with their purchase of the limited partnership interests and have shown no fraud or deceit from which they suffered injury related to their sales of such interests. The decision in *Allico* is thus clearly distinguished from the decision of the Court of Appeals herein and fully consistent therewith.

IV. The Purchaser-Seller Restriction Was Not Applied in This Proceeding

Petitioners urge that this Court rule on the purchaser-seller restriction as enunciated in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir., 1952), cert. den. 343 U.S. 956 (1952), and other decisions. Whatever vitality such restriction may possess, this case does not present an appropriate proceeding for its consideration because the Court below in reaching its decision in no way relied on this restriction.

The decision of the Court of Appeals did not deny that petitioners had standing to sue. There is no question here that petitioners purchased limited partnership interests, but no question, either, that they suffered no damage from such purchases.

If respondents did not have the right to terminate the limited partnership in 1968, it is true that petitioners were not sellers because they retained their interests in the partnership. It is also true that they therefore sustained no damages.

In reaching its decision, the Court of Appeals assumed in petitioners' favor that the redemption of their interests was a sale. The Court found, however, that there was and could be no deception or fraud in connection with the forced sale because if the partnership agreement governed and respondents were legally entitled to terminate the partnership, it would make no difference what respondents misrepresented or concealed.

Thus, the decision of the Court below did not turn on the question whether petitioners were sellers. Rather, assuming that they were, the Court held petitioners still had no claim under the securities laws since the sale was unrelated to a claimed deception which did not harm petitioners. Petitioners, as sellers or as buyers, have not shown harm from deception in connection with the sale or purchase of securities. They have not pleaded a claim for relief under the Securities Acts for that reason, although no one denied they were purchasers and the Court assumed that they were also sellers. The "purchaser-seller doctrine" was in no way determinative of the decision of the Court below. This case does not present that issue to this Court for its determination.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM G. MULLIGAN
Counsel for Respondents HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 401-8TH AVENUE CORPORATION, ROSE W. GROSS, as Executrix of the Estate of SIMEON F. GROSS and ELLIOT S. GROSS, co-partners doing business under the firm and style of "Simeon F. Gross and Elliot S. Gross" ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, and ELLIOT S. GROSS.

30 West 44th Street
New York, N.Y. 10036

March, 1972

APPENDIX

APPENDIX A

Complaint

Class Action

Plaintiffs Demand Trial by Jury

UNITED STATES DISTRICT COURT
For the Southern District of New York

JACOB FERSHTMAN, HAROLD SIEGEL, ISABEL WEST, ZITA GARFIELD, LARRY SOMMA, HYMAN FREYDBERG, RENA KLEIN, JACOB KRIVILOFF, AGNES SHOEMAKER, as Executrix of the Estate of ROBERT SHOEMAKER, individually and as Limited Partners of PENN ASSOCIATES, a New York Limited Partnership.

Plaintiffs.

—against—

HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES, PENN ASSOCIATES, 461-8TH AVENUE CORPORATION, ROSE W. GROSS as Executrix of the Estate of Simeon F. Gross and ELLIOT S. GROSS, co-partners doing business under the firm name and style of "Simeon F. Gross and Elliot S. Gross", ROSE W. GROSS as sole distributee of the Estate of SIMEON F. GROSS, ELLIOT S. GROSS and ARTHUR YOUNG & COMPANY,

Defendants.

Plaintiffs, by their attorney, SAMUEL KALMANASH, for their complaint allege upon information and belief, except as to paragraphs "1" and "2".

Complaint

1. This Court has jurisdiction under Section 22(a) of the Securities Act of 1933 [15 U.S.C. §77v] and under Section 27 of the Securities Exchange Act of 1934 [15 U.S.C. §78aa] and the pendent jurisdiction of this Court.

2. The cause of action hereinafter alleged arises under Sections Nos. 12(2) and 17(a) of the Securities Act of 1933 as amended and Section 10(b) of the Securities Exchange Act of 1934 as amended [15 U.S.C. §78j(b) and Rule 10b-5 [17. C.F.R. 240. 10b-5] of the Securities and Exchange Commission promulgated thereunder: and Section 352-c of the General Business Laws of the State of New York.

3. All of the defendants are inhabitants of, reside in or may be found in the State of New York, and the acts and transactions giving rise to this action occurred in the State of New York and within the territorial jurisdiction of this Court.

4. *Class Action Allegation.* Plaintiffs are and at all the times hereinafter mentioned were limited partners of PENN ASSOCIATES: a New York State Limited Partnership consisting of 47 limited partners, and bring this representative class action pursuant to Rule 23(b), Fed. R. Civ. P. subd. (1) and (3) on behalf of themselves and all others similarly situated to redress the wrongful acts hereinafter complained of, which have been and are presently being committed by the defendants to the limited partners of PENN ASSOCIATES and PENN ASSOCIATES.

Plaintiffs herein will fairly and adequately protect the interest of the class in that its selection of counsel to represent the class will give the class the benefit of substantial evidence to support the cause of action herein alleged as the result of extensive depositions of the defendants and production of exhibits, numbering thousands of pages in a companion action pending in this Court "*Kaine et al v. Schectman, et al;* 68 Civil 2305. The aforesaid depositions have disclosed that the ques-

tions of law and/or fact are common to the class in which the defendants have admitted the omission of disclosure alleged herein to all members of the class and since all the defendants are inhabitants or reside in the territorial jurisdiction of this Court, it is desirable to concentrate in this forum all the litigation of the claims.

5. Plaintiffs are and at all the times hereinafter mentioned were limited partners of Penn Associates and in addition bring this as a derivative action on behalf of themselves as limited partners of Penn Associates and all others similarly situated to redress the wrongful acts hereinafter complained of which have been and are presently being committed by the defendants to the limited partners of Penn Associates and Penn Associates.

6. Defendant, PENN ASSOCIATES, is a New York Limited Partnership, organized and existing pursuant to the Partnership Laws of the State of New York, with its principal office and place of business located at 220 Fifth Avenue, in the Borough of Manhattan, City, County and State of New York.

7. The individual defendants HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN, GEORGE ZUCKERMAN, are and at all the times hereinafter mentioned, were the general partners of the defendant PENN ASSOCIATES (hereinafter at times collectively referred to as the "Managing Partners").

8. That at all times hereinafter mentioned, the Managing Partners were solely and completely in charge of, dominated and controlled completely the affairs and business of PENN ASSOCIATES, including the keeping of its books and records, retention of accountants and attorneys for said partnership and the preparation of statements and income tax returns showing the distributive share of income of the partners.

9. The defendant, 461-8TH AVENUE CORPORATION, (sometimes hereinafter referred to as "the Corporate

defendant") was and is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York, with its principal office now located at 1440 Broadway, in the Borough of Manhattan, City, County and State of New York.

10. SIMEON F. GROSS and ELLIOT S. GROSS prior to and at the time of the organization of PENN ASSOCIATES and the corporate defendant and up to the death of Simeon F. Gross on or about December 31, 1963 were attorneys-at-law of the State of New York, having been duly admitted to practice the profession of law in the State of New York, and at all times herein mentioned, practiced their profession of law in the Borough of Manhattan, City and State of New York as co-partners doing business under the firm name and style of "Simeon F. Gross and Elliot S. Gross" (said partnership hereinafter referred to as "GROSS").

11. After the death of said Simeon F. Gross the defendant Elliot S. Gross continued the practice of law to and including the present time.

12. Gross and the individual defendant Elliot S. Gross at all the times hereinafter mentioned acted as attorneys for and rendered legal services to the Managing Partners of PENN ASSOCIATES, PENN ASSOCIATES and/or the defendant, 461-8TH AVENUE CORPORATION.

13. Simeon F. Gross died on December 31, 1963, a resident of the County of Kings, City and State of New York.

14. The Last Will and Testament of said Simeon F. Gross was probated in the Surrogate's Court of the State of New York, County of Kings under File No. p352/1964 and named his wife, ROSE W. GROSS, as Executrix and she having qualified as such, Letters Testamentary were duly issued by the Surrogate's Court, Kings County to said Rose W. Gross on or about January 20, 1964.

15. Simeon F. Gross by his Last Will and Testament disposed of his entire estate to his said widow, ROSE W. GROSS, and she is the distributee of all of his estate and assets.

16. That prior to the execution of the Limited Partnership Agreement of Penn Associates dated the 4th day of May, 1956 (Exhibit A), the Managing Partners, their agents, representatives, servants and/or employees solicited plaintiffs as partners and represented that said partnership was being organized to acquire from the then owners a mortgage and an unexpired leasehold of approximately 16 years expiring November 30, 1971, on the real estate premises known and designated by the street address 461 Eighth Avenue, New York, N.Y. and thereafter, own, operate, manage, control and rent said premises, receive the income therefrom and the mortgage to be acquired simultaneously by the partnership and that said partnership would continue until (1) the lease on said premises or renewals thereof was sold or (2) terminated and that (3) the investors, including plaintiffs and members of their class would share in the profits thereof in ratable proportion to their initial cash capital investment, which would constitute their percentage interest in the partnership, and that (4) the income received by them each year until their capital would be returned would be at least 12% of their capital contributions, plus their ratable proportion of excess rents shared with the owner of the fee and that the limited partners would invest approximately $400,000. cash and the Managing Partners would invest the cash sum of $330,000.

17. Said defendants Gross and Arthur Young & Company aided and abetted the Managing Partners in their misrepresentations, fraud, deceit and conspiracy hereinafter alleged and their, omission of and failure to disclose material facts in the sale of securities of PENN ASSOCIATES to the limited partners of PENN ASSOCIATES and at the request of the Managing Partners said Gross acted as officers and directors of the

defendant 461-8th AVENUE CORPORATION and held the stock of said Corporation in either of their names for the benefit and use of the Managing Partners.

18. At all the times hereinafter mentioned from the date of its incorporation in or about April 1956 until the date of the death of Simeon F. Gross on or about December 31, 1963, and for some time thereafter the defendants SIMEON F. GROSS and ELLIOT S. GROSS were in name the principal officers, directors and stockholders of the defendants 461-8TH AVENUE CORPORATION and committed the acts hereinafter alleged in violation of their professional position and responsibilities to plaintiffs as attorneys for both PENN ASSOCIATES and 461-8TH AVENUE CORPORATION.

The assumption by said Simeon F. Gross and Elliot S. Gross of the position of principal officers, directors and stockholders was for the sole purpose to conceal the true beneficial interest and identity of the Managing Partners of PENN ASSOCIATES as the controlling stockholder, officers and director principals in 461-8TH AVENUE CORPORATION, in the sale of securities of PENN ASSOCIATES to the limited partners as hereinafter alleged and to aid and abet said Managing Partners to conceal the omission and failure to disclose material facts in connection with the organization of Penn Associates and the sale of its securities to the limited partners.

19. Subsequent to the date of the death of said Simeon F. Gross without disclosure to the plaintiffs or limited partners of PENN ASSOCIATES, the Managing Partners became the principal officers of the defendant, 461-8TH AVENUE CORPORATION, and the Managing Partners constituted the Board of Directors and became the owners of all the issued and outstanding stock of 461-8TH AVENUE CORPORATION.

20. That prior to and at or about the organization and formation of PENN ASSOCIATES and up to shortly prior to

the institution of this action the defendants concealed from and failed to disclose to the plaintiffs and other limited partners that the Managing Partners, the officers, directors and stockholders of the corporate defendant were the same parties in interest and that the self-dealings between the partnership and the defendant corporation were not at arms-length.

21. That in consideration of the fees, payments and other emoluments and considerations to Gross, Elliot F. Gross and Arthur Young & Company paid by the Managing Partners, Penn Associates and the corporate defendant either directly and/or indirectly the aforesaid joined in, aided and abetted the conspiracy and fraud practiced by the Managing Partners upon the plaintiffs and members of their class as herein stated upon the organization and formation of PENN ASSOCIATES by lending themselves to conceal the identity and interests of the Managing Partners in the transactions herein set forth and thereby aided and abetted the fraudulent scheme and conspiracy to benefit said Managing Partners who were in fact the stockholders, owners and in control of the corporate defendant and caused false and improper statements and income tax returns to be prepared and distributed showing distribution of income to the limited partners knowing they would rely thereon.

22. Beginning in April 1956 and continuing thereafter to the present time all of the defendants engaged in a continuing agreement, understanding, concert of action, plan, scheme and conspiracy to, and did in fact, unlawfully, wilfully and knowingly, directly and indirectly, in the sale of securities of PENN ASSOCIATES to the plaintiffs and other limited partners of PENN ASSOCIATES, which securities consisted of $400,000. of limited partnership interests in PENN ASSOCIATES, by the use and means and instruments of transportation and communication in interstate commerce and by the use of the mails, (a) employ devices, schemes and

artifices to defraud; (b) obtain money by means of untrue statements of material facts and/or omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading; and (c) engage in acts, practice or course of business which operates or would operate as a fraud or deceit upon the plaintiffs and members of their class as herein alleged.

23. The acts and omissions of the defendants as herein alleged were part of a continuing agreement, understanding, concert of action, plan, fraudulent scheme and conspiracy among the Managing Partners, aided and abetted by their co-defendants, to represent and induce, and did in fact induce the plaintiffs and members of their class to furnish their equity cash capital contributions to PENN ASSOCIATES which would be used by PENN ASSOCIATES together with the equity cash capital contribution of the sum of $330,000, by the Managing Partners for the purchase of the aforesaid lease in the unexpired term of approximately 16 years and mortgage on premises 461-8TH AVENUE from its then owners thereof as the purpose in the formation of PENN ASSOCIATES and thereafter defraud the limited partners as herein alleged.

24. As part of said continuing agreement, understanding, concert of action, plan, scheme and conspiracy to induce the plaintiffs and members of their class to purchase equity securities of PENN ASSOCIATES, and knowing that the plaintiffs and members of their class intended to rely upon the representations made, as complete, truthful and not misleading, the Managing Partners made or caused to be made untrue, statements of material facts as follows:

(a) That the partnership PENN ASSOCIATES was being organized to acquire an unexpired lease of approximately 16 years to November 31, 1971 and a mortgage on premises 461-8TH AVENUE, in the Borough of Manhattan, City and State of New York from the then owners thereof.

(b) That the limited partners were to invest the sum of $400,000. cash equity capital and the Managing Partners were going to invest the sum of $330,000. cash equity capital.

(c) That the partnership would continue until the lease or any renewals thereof terminated or would be sold in which event all partners would share in capital gain in ratable proportion to their cash equity capital contribution.

(d) That until the partners capital contributions were repaid from payments received in amortization or reduction of the mortgage the limited partners would receive out of first profits at least 12% of their cash equity capital contribution.

25. As a fruther part of said continuing agreement, understanding, concert of action, plan, scheme and conspiracy to induce the plaintiffs and members of their class to purchase equity securities of PENN ASSOCIATES, the Managing Partners omitted to state, and failed to disclose, which omission and failure to disclose have been aided and abetted by their conspirator defendants up to the discovery thereof, as follows:

(a) At the time plaintiffs and members of their class were being solicited as limited partners of Penn Associates, said Managing Partners had in fact entered into a contract through the media of the corporate defendant: 461-8TH AVENUE CORPORATION to acquire said lease and mortgage.

(b) That the agreement to purchase the lease and mortgage by the defendant 461-8th Avenue Corporation was upon more favorable terms than 461-8TH AVENUE CORPORATION was making with Penn Associates.

(c) That in acquiring the lease and mortgage, Penn Associates instead of dealing with the then owners of said lease and mortgage, would instead be purchasing said lease and mortgage from the Managing Partners through the guise of their wholly owned and controlled corporate defendant the 461-8TH AVENUE CORPORATION.

(d) That Simeon F. Gross was the President of the 461 8TH AVENUE CORPORATION.

(e) That Simeon F. Gross was the attorney for the Managing Partners and was also acting as attorney for Penn Associates.

(f) That Simeon F. Gross who held all the stock of 461 8th Avenue Corporation held same for the beneficial owners, the Managing Partners.

(g) That in purchasing said lease and mortgage from the 461 8th Avenue Corporation, Penn Associates was entering into an operating agreement with the 461 8th Avenue Corporation, the alter ego of the Managing Partners, whereby the Managing Partners through said corporate defendant would receive a share of the profits in the operation of the leasehold and ownership of the mortgage without any investment of cash equity capital.

(h) That the defendant 461 8th Avenue Corporation which in effect was the Managing Partners alter ego had made a more advantageous agreement for the purchase of the lease and mortgage than it was giving to Penn Associates in that the amount of excess rental from the premises 461 8th Avenue which it shared with the owner of the fee was a lesser amount than which Penn Associates would receive as its share and the percentage retained by the corporate defendant would be a greater percentage than Penn Associates would receive.

(i) That the Managing Partners did not intend to invest the sum of $330,000 cash equity capital but had arranged with the Irving Trust Company that it would first obtain the Limited Partners cash equity capital contributions in the sum of approximately $400,000 which they would deposit with the Irving Trust Company, which would then make a loan of $300,000 to Penn Associates on the pledged collateral security of the lease and mortgage to be acquired by Penn

Associates; said Managing Partners thereby made a cash equity capital investment of $30,000. which is their ratable proportionate investment in Penn Associates rather than $330,000. as agreed.

(j) The tax advantages of the operation of the leasehold such as amortization of the leasehold acquisition and depreciation of improvements were to be and were siphoned off to 461-8TH AVENUE CORPORATION for the sole benefit of the Managing Partners.

(k) That extensions of leases would be sought through the medium of 461 8TH AVENUE CORPORATION and were in fact obtained in 1962 and 1963 and as of January 1, 1968 for a twenty year period expiring December 31, 1988.

26. That upon the organization and formation of PENN ASSOCIATES, the Managing Partners to aid the fraudulent scheme and conspiracy to benefit themselves as beneficial stockholder, officers and directors of the corporate defendant, 461-8TH AVENUE CORPORATION, fraudulently and falsely misrepresented and deceived and misled the plaintiffs and their class of limited partners that the partnership would only terminate upon the sale of the leasehold of the office building 461-8TH AVENUE, in the Borough of Manhattan, City, County and State of New York, or such other events which would terminate the partnership and cause distribution of the assets to all partners.

27. That at the time said representations and inducements were made, they were false and fraudulent and were known to the defendants to be false and fraudulent and were made only with the intent of inducing the plaintiffs and members of their class of limited partners to contribute their capital for the Managing Partners purposes and needs and for the intent of cheating and defrauding the plaintiffs and members of their class by inducing them to sign an improper, unclear and

ambiguous instrument (Exhibit "A") which did not properly set forth the aforesaid agreement on the ground that expediency required its immediate signature. Plaintiffs believing said representations to be true, and not being aware of the defendants failure to disclose material facts, did justifiably rely upon said false and fraudulent representations that said partnership would continue until said leasehold was sold or terminate for all and plaintiffs and members of their class would continue to receive their ratable percentage of the partnership profits capital gain in the event of sale of the leasehold and tax advantages as aforesaid.

28. That prior to the expiration of the leasehold (November 30, 1971) and/or sale of said leasehold on premises 461-8th Avenue and prior to the attempted termination of the partnership hereafter alleged, the defendants secretly and without disclosing said facts to the plaintiffs and other limited partners of PENN ASSOCIATES and in violation of their fiduciary obligation and position of trust to the partnership and the limited partners thereof, and after expending large amounts of partnership funds in making capital improvements to the leasehold, in the name of and ostensibly in behalf of the corporate defendant secretly renegotiated and obtained extensions of leases from the fee owners of premises 461 Eighth Avenue, in 1962 and 1965 and as of January 1, 1968 for a further term expiring December 31, 1988, which except for some incidental changes was upon the same terms and conditions as the prior lease, which said renewal in the light of the unilateral attempted termination of the limited partners interests shortly thereafter was a gross and deliberate fraud and a flagrant and callous breach of trust owed to PENN ASSOCIATES and to the limited partners of PENN ASSOCIATES.

29. That by notice dated March 29, 1968, the Managing Partners of PENN ASSOCIATES, although the leasehold on

461-8th Avenue had not been sold, unilaterally illegally, arbitrarily and fraudulently notified the limited partners that their interest in the partnership was being terminated.

30. At the time the limited partners were notified as aforesaid, the defendants failed to inform or disclose to the plaintiffs and members of their class that the Managing Partners through the media of their alter ego, the 461-8TH AVENUE CORPORATION, had in 1962 and 1965 and again as of January 4, 1968, during the term of the lease for which PENN ASSOCIATES had been organized and while said lease was still in full force and effect, made extensions of said lease for a twenty (20) year period expiring December 31, 1988.

31. That the defendants had conspired since the sale of the equity securities in Penn Associates at the inception to acquire for the Managing Partners the assets of the partnership and without disclosure to the limited partners of said conspiracy. That in furtherance of such conspiracy and as an overt act thereof, the corporate defendant, 461-8TH AVENUE CORPORATION at the behest of the Managing Partners and for their benefit and financial gain to the detriment of the plaintiffs and members of their class solicited and obtained prior to and as of the 1st day of January, 1968 renewals and extensions of the lease covering premises 461 Eighth Avenue, New York, New York, for the term ending December 31, 1988 as aforesaid.

32. That the defendants and particularly the Managing Partners in sole and complete control of PENN ASSOCIATES' operations and in violation of their position of trust to the plaintiffs and their class of limited partners fraudulently conspired and failed to disclose to plaintiffs and members of their class the appropriation of the assets of the partnership whose beneficial ownership in the event of a sale, or income would be ratably payable to the limited partners, all in violation of their position of trust and in violation of their fiduciary obligations to the plaintiffs as a class.

33. That in negotiating with the owner of premises 461-8th Avenue, New York, said Managing Partners arranged and negotiated for themselves as the beneficial stockholders of the corporate defendant extensions of the lease in 1962 and 1965 and 1968 on said 461-8th Avenue and failed to disclose their acts all of which they should be held to have done in their capacities as trustees for the limited partners as *cestui que trustant*.

34. The alleged termination of the partnership is illegal, unlawful and in violation of the Partnership Laws of the State of New York and said purported termination of the partnership should be declared null and void and the partnership declared in full force and effect and the Managing Partners and the corporate defendant held to be constructive trustees of all the assets, rents, income and profits made and the extension of the lease heretofore referred to as a result of their illegal and unlawful failure to disclose the aforesaid and a receiver be appointed of the assets, lease and its extension for the benefit of the plaintiffs and members of their class and the defendants barred from all interest in the aforesaid.

35. That as a result of the fraud, deceit and conspiracy practiced by the defendants upon the limited partners aforesaid the profits and income of said defendants should be declared the profits and income of the partnership and distributed to all of the partners ratably in proportion to their initial percentage contribution to the partnership.

36. That although heretofore duly demanded, the defendants and each of them, failed and refused and still fail and refuse to account fully and to pay over to the plaintiffs and members of their class the profits of the partnership and the profits that the individual defendants have diverted to themselves in violation of their fiduciary obligation to the plaintiffs and members of their class from whom the defendants have diverted the profits by the guise of the interjection of the corporate defendant and otherwise.

37. That the defendants be held liable in the sum of $2,000,000. as punitive damages for the intentional wrongs practiced on the limited partners as herein alleged besides such other relief as herein set forth.

WHEREFORE, plaintiffs pray for final judgment:

I. Declaring 461-8th AVENUE CORPORATION, PENN ASSOCIATES and the defendants, HERMAN J. SCHECTMAN, SIDNEY P. SCHECTMAN, JOHN D. BUSSEL, HENRY SPELLMAN and GEORGE ZUCKERMAN, individually and as General Partners of PENN ASSOCIATES and 100% stockholders of 461-8th AVENUE CORPORATION, as constructive trustees for the benefit of PENN ASSOCIATES and the plaintiffs and members of their class as limited partners of the ownership of the leasehold on 461-8th Avenue in the Borough of Manhattan, City and State of New York and any and all extensions and renewals thereof.

II. Requiring defendants to account to Penn Associates as to the transaction and tax advantages between PENN ASSOCIATES and 461-8TH AVENUE CORPORATION and the assets and moneys received and had in the joint accounts between PENN ASSOCIATES and 461-8TH AVENUE CORPORATION and the defendants and each of them be decreed to pay over to PENN ASSOCIATES for distribution to plaintiffs and members of their class of the sums ascertained to be due them.

III. Decreeing the interests of the plaintiffs and members of their class and the Managing Partners in accordance to their cash equity capital contributions to PENN ASSOCIATES.

IV. Requiring defendants to account to PENN ASSOCIATES and the limited partners of PENN ASSOCIATES, for compensatory and punitive damages due them in the sum of $2,000,000. for their wilful and intentional acts to defraud plaintiffs and members of their class.

V. Awarding to plaintiffs the costs and disbursements of this action, together with reasonable attorney's fees in an amount to be approved by this Court and ordering and requiring payment of the same from the account of PENN ASSOCIATES, or in such other manner or from such other source or sources as may be determined by this Court; and

VI. Awarding to plaintiffs and/or to or for the benefit of the limited partners of PENN ASSOCIATES, such other, further and different relief as to the Court may seem just, equitable and proper in the premises, including all disbursements and expenses of this action and provisions for plaintiffs' attorneys' and accountants' fees and costs.

Dated: New York, New York
June 2, 1970.

/s/ Samuel Kalmanash
SAMUEL KALMANASH, ESQ.
Attorney for Plaintiffs
Office & P.O. Address
292 Madison Avenue
New York, New York 10017
Telephone No. 212-889-8288

APPENDIX B

Limited Partnership Agreement

LIMITED PARTNERSHIP AGREEMENT dated the 4th day of May, 1956, among HERMAN J. SCHECTMAN, residing at No. 360 Cabrini Boulevard, New York, N. Y., SIDNEY P. SCHECTMAN, residing at No. 25 Oaks Hunt Road, Lake Success, Long Island, N. Y., GEORGE ZUCKERMAN, residing at 6801 - 21st Avenue, Brooklyn, N. Y., HENRY SPELLMAN, residing at No. 250 West 94th Street, New York, N. Y., and JOHN D. BUSSEL, residing at No. 45 East 82nd Street, New York, N. Y., as GENERAL PARTNERS, and ABRAHAM WEZEKEWITZ, in trust for Sheba Wezekewitz, residing at 778 East 3rd Street, Brooklyn, N. Y., JOSEPH LOMBARDO, in trust for Angela Lombardo, residing at 215 President Street, Brooklyn, N. Y., WILLIAM L. GOLDBERG, in trust for Sadie Goldberg, residing at 1615 Avenue I, Brooklyn, N. Y., SIDNEY J. WHITE, residing at 6510 N. 11th Street, Oak Lane, Philadelphia, Pennsylvania, IRENE STEINBERG, residing at 74-12 35th Avenue, Jackson Heights, Long Island, N. Y., GEORGE SCOVNER, residing at 6701 - 19th Avenue, Brooklyn, N. Y., EDWARD SCOVNER, residing at 6701 - 19th Avenue, Brooklyn, N. Y., FRIEDA MADRESH, residing at 764 Arnow Avenue, Bronx, N. Y., ROSE LANDAU, residing at 35-53 82nd Street, Jackson Heights, Long Island, N. Y., BERTHA SCHNIPPER, residing at 64 Linden Avenue, Springfield, New Jersey, SONIA H. STIRT, residing at 7 West 96th Street, New York, N. Y., SOL BLOOMBERG, residing at 825 East 9th Street, Brooklyn, N. Y., JACK PLUDO, residing at 1680 Ocean Avenue, Brooklyn, N. Y., ANNE YOUNG, residing at 55 East 86th Street, New York, N. Y., LEON RUDORFER, residing at 377 Montgomery Street, Brooklyn, N. Y., HENRY KISLAK, residing at 533 Green Place, Woodmere, Long Island, N. Y., GEORGE B. JERZY GLASS, in trust for Janet Catherine Glass, residing at 60 Sutton Place South, New York, N. Y., LILLIAN WEINGARTEN, residing at 685 West End Avenue, New York, N. Y., JOHN D. BUSSEL, in trust for James Bruce Bussel, residing at 45 East 82nd Street, New York, N. Y., ROBERTA SPELLMAN, residing at 250 West 94th Street, New

York, N. Y., CLARA ZUCKERMAN, residing at 6801 21st Avenue, Brooklyn, N. Y., JACOB KRIVHOFF, residing at 182 Bennett Avenue, New York, N. Y., ALBERT KAINE, residing at 300 Hayward Avenue, Mount Vernon, N. Y., ISABEL WEST, residing at 82 Mulchester Avenue, White Plains, N. Y., ROBERT SHOEMAKER, residing at 61 DeKalb Avenue, White Plains, N. Y., ALFRED B. SOMMA, residing at 76 No. Main Street, Brewster, N. Y., HYMAN FREYDBERG, residing at 2322 Grand Avenue, Bronx, N. Y., LARRY SOMMA, residing at 71 Leyton Place, White Plains, N. Y., REUBEN LIPTON, residing at 12 Princeton Avenue, Yonkers, N. Y., WILLIAM KOLINS, residing at 300 Hayward Avenue, Mount Vernon, N. Y., JACOB FERSHTMAN, residing at 67 Crotty Avenue, Yonkers, N. Y., HARRY S. FRIEDLANDER, residing at 1695 Grand Concourse, Bronx, N. Y., A. RICHARD GREENE, residing at 62 Bryant Avenue, White Plains, N. Y., IRVING CHESTNEY, residing at 66-56 Saunders Street, Forest Hills, L. I., N. Y., LEON PENTEL, residing at 25 Central Park West, New York, N. Y., LEO BROWN, residing at 31 Old Farm Road, Lake Success, L. I., N. Y., THELMA ROSENBERG, residing at 2082 Bryant Avenue, Bronx, N. Y., EVE ROSENBERG, residing at 219 West 81st Street, New York, N. Y., JESSE SCHECTMAN, residing at 34-21 78th Street, Jackson Heights, Long Island, N. Y., IRVING HANAN, residing at 2845 University Avenue, Bronx, N. Y., ABE KLEIN, residing at 88 Grandview Boulevard, Yonkers, N. Y., SELMA SEIFFERT, residing at 88 Avon Avenue, Forest Hills, N. Y., HAROLD SIEGEL, residing at 182 Crosthill Road, Yonkers, N. Y., DAVID BRUNELL, residing at 84 Cooper Drive, New Rochelle, N. Y., ROBERT LISOWORN, of 1430 Broadway, New York, N. Y., CELIA GREENBERG, residing at 985 Northfield Road, Woodmere, L. I., N. Y., and R. ROY GREENBERG, residing at 985 Northfield Road, Woodmere, L. I., N. Y., as LIMITED PARTNERS,

WHEREIN IT IS MUTUALLY AGREED AS FOLLOWS:

1. The name of the Limited Partnership is "PENN ASSOCIATES".

2. The character of the partnership's business is the operation, management and control of premises No. 461 Eighth Avenue, New York City, hereinafter called the "office building", and the ownership of the second mortgage on the fee of said premises herein called "the mortgage", in accordance with the provisions of an agreement between 461-8th AVENUE CORPORATION and "PENN-ASSOCIATES", dated the 4th day of May, 1956, a copy of which agreement is attached hereto and made a part hereof.

3. The principal place of business of the partnership is at No. 220 Fifth Avenue, Borough of Manhattan, County of New York, City and State of New York.

4. The name of each General Partner, and the investment made by each, is as follows:

General Partner	Contribution
Herman J. Schustman	$82,500.00
Sidney P. Schustman	82,500.00
John D. Russel	35,000.00
Henry Spellman	35,000.00
George Zuckerman	35,000.00

5. The name of each Limited Partner, and the contribution made by each, is as follows:

Limited Partner	Contribution
Abraham Wezekowitz, in trust for Sheba Wezekowitz	$25,002.50
Joseph Lombardo, in trust for Angela Lombardo	10,001.00
William L. Goldberg, in trust for Sadie Goldberg	10,001.00
Sidney J. White	10,001.00
Irene Steinberg	10,001.00
George Sweeney	10,001.00

Limited Partner	Contribution
Edward Seaver	10,001.00
Frieda Madresh	10,001.00
Rose Laidau	10,001.00
Bertha Schniper	10,001.00
Sonia H. Stirt	10,001.00
Sol Bloomberg	10,001.00
Jack Pludo	10,001.00
Anne Young	26,002.60
Aaron Rudorfer	10,001.00
Henry Kislak	10,001.00
George B. Jerzy Glass, in trust	
for Janet Catherine Glass	10,001.00
Lillian Weingarten	10,001.00
John D. Bussel, in trust for	
James Bruce Bussel	5,000.50
Roberta Spellman	5,000.50
Clara Zuckerman	5,000.50
Jacob Kriviloff	5,000.50
Albert Kaine	5,000.50
Isabel West	5,000.50
Robert Shoemaker	5,000.50
Alfred W. Somma	5,000.50
Hyman Freydberg	5,000.50
Larry Somma	5,000.50
Reuben Lipton	5,000.50
William Kolins	5,000.50
Jacob Fershtman	5,000.50
Harry S. Friedlander	10,001.00
A. Richard Greene	10,001.00
Irving Chestney	5,000.50
Leon Pentel	15,001.50
Leo Brown	5,000.50
Thelma Rosenberg	8,000.80
Ace Rosenberg	10,001.00
Jesse Schectman	10,001.00

Limited Partner	Contribution
Irving Hanan	20,002.00
Abe Klein	5,000.50
Selma Seiffert	5,000.50
Harold Siegel	5,000.50
David Brunell	2,000.20
Robert Leon Horn	5,000.50
Celia Greenberg	12,501.25
R. Roy Greenberg	2,500.25

6. The partnership shall commence on the date of filing the Certificate of Limited Partnership in the Office of the County Clerk of New York County. The partnership shall terminate on the 30th day of November, 1971, unless sooner terminated by either:

(a) a sale of the leasehold on the office building; or

(b) repayment of the contributions of the Limited Partners in full, as is more particularly hereinafter set forth; or

(c) retirement, death or insanity of a General Partner.

7. None of the Limited Partners has agreed to make any additional contribution to the capital of the partnership.

8. The contributions of the Limited Partners to the capital of the partnership may be returned to them in whole, or in part, at any time, in the sole discretion of the General Partners, provided that all repayments of capital shall be pro rata among all the Limited Partners, subject to the provisions of paragraph 14.

9. Subject to the provisions of Section 104 and 105 of the Partnership Law, the minimum required repayments of the capital contributions of the Limited Partners shall be as follows:

(a) Four (4%) percent of the original capital contribution of the Limited Partners for each of the first five (5) years from the date hereof;

(c) the term "other expenses" shall be deemed to include all expenses of whatsoever kind or nature other than those referred to in (a) and (b) hereof actually and reasonably incurred in connection with the operation of the business of the partnership, including, without limitation, organization expenses, filing fees, legal fees, accounting fees, and moneys paid or payable in connection with claims against the partnership.

11. The net profits of the partnership shall be divided ratably among the Limited Partners in accordance with the contribution of each, as hereinabove set forth, at the rate of twelve (12%) percent per annum on the then outstanding balance of the capital contribution of each Limited Partner. Any profits remaining after such distribution of twelve (12%) percent annually, shall belong solely to the General Partners, to be divided among them in proportion to the capital contributions made by them, subject to the following single limitation:

In addition to the twelve (12%) percent distribution, as hereinabove provided, the Limited Partners shall share with the General Partners in the twenty-five (25%) percent of the amount of rent actually collected from premises No. 461 Eighth Avenue, New York City, in excess of EIGHT HUNDRED FIFTEEN THOUSAND ($815,000.00) DOLLARS, for any year that this agreement is in effect. Such additional distribution shall be apportioned in accordance with the original capital contribution of each General and Limited Partner, and payment made on or before September 30, 1956 and quarterly thereafter until the expiration of this agreement.

12. Losses suffered or incurred by the partnership shall be borne by the General and Limited Partners in proportion to their respective original capital contribution in the partnership, provided that no Limited Partner shall bear any loss in excess of his original capital contribution increased by the amount of distributions made to such Limited Partner, pursuant to the provisions of paragraph 9 of this agreement. All losses incurred

by the partnership in excess of the original contribution to the capital of the partnership, and the total distributions of the partnership shall be borne by the General Partners in proportion to their capital contribution.

13. The General Partners shall have the right at any time to modify the agreement dated the 4th day of May, 1956 between the partnership and 461-8th AVENUE CORPORATION so as to

(a) increase the basic monthly rent payable to the landlord of the office building for all or any part of the unexpired period of the present lease, and such modification shall be binding upon the partnership; and

(b) to renew or extend the lease on the office building so that said lease shall continue in effect, or be renewed past November 30, 1971, the present termination date. Such renewal or extension shall not extend the life of the limited partnership past the time set for termination in paragraph 6 herein.

In the event of any modification in the amount of basic monthly rent payable to 461-8th AVENUE CORPORATION, then the General Partners agree that if subsequent distributions of net profits to Limited Partners, pursuant to the provisions of paragraph 11 shall not reach twelve (12%) percent for any year that this agreement remains in effect, the General Partners shall in proportion to their capital contribution, personally contribute to the increase of the distribution of each Limited Partner so that each of the Limited Partners shall receive twelve (12%) percent per annum on the remaining balance of his capital contribution.

14. In the event that the agreement dated the 4th day of May, 1956 between 461-8th AVENUE CORPORATION and partnership is cancelled by reason of the sale of the leasehold on the office building, then the Limited Partners shall be entitled to receive the following sums:

(a) Return of balance of capital contribution; and

(b) Twelve (12%) percent interest on such balance to be computed from the commencement of the current fiscal year, or the date of the most recent profit distribution, whichever period is shorter; and

(c) Ratable portion of the capital gain realized upon such sale, on the proportion that the original capital contribution of each bears to SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS.

15. The General Partners shall have the absolute right to assign, pledge, mortgage or hypothecate any of the assets of the partnership, whether for the purpose of the partnership, or for their own capital contributions, but not for more than a loan of THREE HUNDRED THOUSAND ($300,000.00) DOLLARS or any extension or renewal thereof, provided the proceeds of such loan or loans are used for the purposes of the partnership or towards the contribution of the capital of the General Partners.

16. None of the Limited Partners shall have the right to substitute an assignee as contributor in his place, except that the interest of a Limited Partner may be assigned, provided the prior written consent of the General Partners to any such assignment shall first be obtained. With the prior written consent of the General Partners (not to be unreasonably withheld), an assignee of a Limited Partner may be admitted as a Limited Partner in the place and stead of the assigning Limited Partner, upon condition that any such assignee so to be admitted shall execute and acknowledge such instruments, in form and substance reasonably satisfatory to the General Partners which they may deem necessary or desirable to effectuate such admission and to confirm the agreement of the person being admitted as such Limited Partner to be bound by all the covenants, terms and conditions of the partnership agreement as the same may have been amended; such assignee so to be admitted shall also pay all reasonable expenses in connection with such admission as a Limited Partner, including,

but not limited to, the cost of the preparation, filing and publishing of any amendment of the Certificate of Limited Partnership which the General Partners may deem necessary or desirable in connection with the admission of such assignee as a Limited Partner.

17. The partners shall not have the right to admit additional Limited Partners except that, with the prior written consent of the General Partners (not to be unreasonably withheld), an assignee of a Limited Partner, or executor, administrator, trustee, legatee or distributee of a deceased Limited Partner may be admitted as a Limited Partner in the place and stead of the assigning Limited Partner or deceased Limited Partner, as the case may be, upon the same terms and conditions, as hereinabove provided, in paragraph 16.

18. None of the partners, General or Limited, shall have the right to demand or receive property other than in cash in return for their contributions to the capital of the partnership.

19. The partnership books shall be kept at the principal place of business of the partnership, and the Limited or General Partners shall have the right at all reasonable times to inspect and copy any of them. The General Partners shall also deliver to each Limited Partner quarterly, a statement of income, and also the Information Returns showing the Income of each Limited Partner, prior to the filing thereof with the Federal and State Governments. The General Partners further agree to furnish each Limited Partner with a final detailed statement upon the termination of the partnership.

20. The General Partners agree to render necessary services in connection with the business of the partnership, and to devote as much time thereto as may be necessary, it being agreed, however, that they may engage in other businesses, including real estate activities, and may, if they deem it advisable, employ a managing agent to have charge of the operation of the office building. They agree to furnish, from the

date of this agreement, office facilities, including telephone, stationery, secretarial and like facilities, for the expense of which they shall be entitled to receive reasonable reimbursement. No salary, bonus, fee, compensation or remuneration for services to the partnership shall be paid to any General Partner.

The General Partners shall have complete control of the business of the partnership. In the event of any dispute or difference of opinion as to the policies of the partnership or as to the management of its business or (except with respect to the Limited Partners) concerning the interpretation of this agreement, or the rights of the parties, the final decision shall be made by a majority in interest of the General Partners, and each party hereto agrees to abide by any such decision. The phrase "a majority in interest of the General Partners", as used above, shall mean and refer to any three or more General Partners the aggregate of whose capital contributions exceeds fifty-one (51%) percent of the capital contributions made by the General Partners.

21. Unless otherwise specified in writing, the address of each party hereto shall be that set forth following his name above.

22. This agreement may be executed in counterparts, all of which taken together shall be deemed one original. Each partner agrees that one original of this agreement (or set of original counterparts) shall be held at the office of the partnership and that there shall be distributed to each partner a conformed copy thereof.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals as of the date hereinabove set forth.

AS GENERAL PARTNERS

/s/ HERMAN I. SCHECTMAN (L.S.)

/s/ SIDNEY P. SCHECTMAN (L.S.)

/s/ HENRY SPELLMAN (L.S.)

/s/ GEORGE ZUCKERMAN (L.S.)

/s/ JOHN D. BUSSEL (L.S.)

AGREEMENT made this 4th day of May, 1956, between 461-8th AVENUE CORPORATION, a domestic corporation, having its principal office in Suite 600, No. 277 Broadway, Borough of Manhattan, City, County and State of New York (hereinafter referred to as "CORPORATION"); and PENN ASSOCIATES, a limited partnership having its office at No. 220 Fifth Avenue, in the Borough of Manhattan, City, County and State of New York (hereinafter referred to as "PENN").

WITNESSETH:

WHEREAS, CORPORATION has contracted to purchase the leasehold on premises known as No. 461-8th Avenue, in the Borough of Manhattan, City, County and State of New York, for a consideration of TWO HUNDRED EIGHTY-SIX THOUSAND TWO HUNDRED FIFTY ($286,250.00) DOLLARS; and

WHEREAS, CORPORATION has contracted to purchase for the sum of THREE HUNDRED NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY ($393,750.00) DOLLARS the second mortgage on the fee of the same premises, which mortgage was originally in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS but reduced to the sum of THREE HUNDRED NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY ($393,750.00) DOLLARS; with interest at the rate of two (2%) percent per annum from the 1st day of March, 1956, payable quarter-annually, together with the quarter-annual installments of SIX THOUSAND TWO HUNDRED FIFTY ($6,250.00) DOLLARS in reduction of the said mortgage, until said mortgage is fully paid; and

WHEREAS, CORPORATION requires additional sums of money for the payment of tax deposits and prepaid rent at the time of closing; and

WHEREAS, CORPORATION has informed PENN that it does not have sufficient moneys to consummate said transactions and has requested PENN to advance such moneys, upon the terms and conditions hereinafter set forth; and

WHEREAS, PENN has agreed to furnish the moneys required by CORPORATION for the consummation of such transactions, upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

1. *Loan.* PENN agrees to loan to CORPORATION the sum of SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS to be used by CORPORATION for the following purposes:

A. The sum of TWO HUNDRED EIGHTY-SIX THOUSAND TWO HUNDRED FIFTY ($286,250.00) DOLLARS to be applied to the purchase price of the leasehold on premises No. 461 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York, from HERMAN HAIMES, BENJAMIN KAUFMAN and MORRIS A. MARKS, as sellers, in accordance with the terms of a contract dated April 11, 1956, a copy of which has been exhibited to PENN.

B. The sum of THREE HUNDRED NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY ($393,750.00) DOLLARS to be applied to the purchase price of the second mortgage, as reduced, covering the fee of the premises in accordance with the provisions of the contract, hereinabove mentioned.

C. The sum of FIFTY THOUSAND ($50,000.00) DOLLARS to be applied to the adjustments of the transaction, including reimbursement to the sellers for the assignment of the tax reserve held by the owner of the fee, pursuant to the terms of the lease; the payment of the base rent for the month

beginning May 1, 1956, prepaid insurance premiums, and such other adjustments as may be necessary pursuant to the terms of the contract of purchase and sale.

2. *Security for Loan.* CORPORATION does hereby agree to assign to PENN, by a duly executed assignment of mortgage, the second mortgage on the fee of premises No. 461-8th Avenue, New York City, originally in the sum of FIVE HUNDRED THOUSAND ($500.000.00) DOLLARS, and reduced by payments, to THREE HUNDRED NINETY-THREE THOUSAND SEVEN HUNDRED FIFTY ($393,750.00) DOLLARS as soon as such mortgage is assigned to CORPORATION. Such mortgage is to be reassigned by PENN to CORPORATION by a duly executed assignment of mortgage as soon as the balance of the loan of SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS is repaid by CORPORATION to PENN.

PENN agrees to take such assignment subject to the provisions of said mortgage, and further agrees to execute any consents that may be necessary, and in all respects to comply with the covenants and conditions on the part of the mortgagee to be performed. During the time the loan is not fully repaid, PENN is hereby given the right to assign, hypothecate or pledge this mortgage for any loan obtained by PENN.

3. *Employment and Term.* CORPORATION does hereby grant to PENN the exclusive right to operate, control, manage and supervise the leasehold on 461 Eighth Avenue, in the Borough of Manhattan, City, County and State of New York, from the date of the assignment of the leasehold to CORPORATION until the expiration of the major lease, or until such earlier time that PENN shall give to CORPORATION thirty (30) days' written notice, by certified mail, that it desires to cancel this agreement and terminate its liability as of the last day of the month following the date of mailing of such notice.

Limited Partnership Agreement

4. *Share of the Profits.* During the term of this agreement, PENN shall pay to CORPORATION five (5%) percent of the net profits of the operation of the leasehold, as follows:

(a) Definition of "net profits". Net profits as used herein shall mean the "net earnings" of PENN for each fiscal year ending April 30th, beginning with the fiscal year commencing May 1, 1956, as determined by the auditor regularly employed by PENN; such computation to be made in accordance with sound accounting practice. Without limiting the generality of the foregoing, the following shall be observed:

(1) The amount deducted for taxes shall include all taxes, except income tax.

(2) Proper deductions shall be made for the return of the loan of PENN, at the following rates:

(i) Four (4%) percent per annum for each of the first five (5) years;

(ii) Six (6%) percent per annum for each of the following four (4) years;

(iii) Eight (8%) percent per annum for the following six (6) years; and

(iv) Eight (8%) percent [illegible] the expiration of this agreement.

(3) A deduction shall be allowed for collection of rents, provided such expense shall be no greater than customary rates set by the Manhattan Real Estate Board then in effect.

(b) Determination of net profits. The net profits shall be determined by the auditor within fifteen (15) days after the close of each fiscal year, and a written statement of such determination shall be submitted by the auditor to CORPORATION within five (5) days of each such determination. The auditor's statement shall be conclusive on the parties hereto.

(c) Payment of net profits. Within ten (10) days after the determination of net profits for each fiscal year, PENN shall pay to CORPORATION an amount equal to five (5%) percent of such net profits with credit for any interim payments made by PENN to CORPORATION during such fiscal year.

5. *Renewal.* In the event CORPORATION shall renew its lease for any period beyond its present expiration, then PENN shall have the option of extending this agreement for the renewal period of the lease, provided PENN shall pay to CORPORATION an amount equal to the consideration paid by CORPORATION to the landlord, together with expenses of such renewal and its attorney's fees, regardless of whether the limited partnership is dissolved, and "PENN ASSOCIATES" is then a partnership.

6. *Payments of Rents and Taxes.* PENN agrees to pay to CORPORATION on or before the last day of the month the base rent called for under the terms of the lease, for the following month, as well as a sum equal to one-twelfth of the annual taxes on or against premises No. 461 Eighth Avenue, New York City (as estimated by the landlord). PENN also agrees to pay to CORPORATION on or before June 10, 1956 and on the 10th day of each quarter thereafter, a sum equal to one-fourth of the excess, if any, of the actual rents collected in the preceding quarter-annual period over the sum of ONE HUNDRED SIXTY-SEVEN THOUSAND NINE HUNDRED SEVENTY-ONE and 13/100 ($167,971.13) DOLLARS.

7. *Cancellation by Corporation.* CORPORATION shall have the right and privilege to cancel this agreement in the event of a bona fide sale of its leasehold, provided:

(a) PENN shall receive ninety-five (95%) percent of the net profits of the sale of the lease;

(b) the balance remaining unpaid on the original loan of SEVEN HUNDRED THIRTY THOUSAND ($730,000.00) DOLLARS is fully repaid; and

(c) adjustments are made of net profits for the fiscal year of cancellation or for the portion of the fiscal year of cancellation from the beginning of such period to the date of the sale of the leasehold.

8. *Assignment.* It is understood and agreed that PENN shall not have the right to assign this agreement or its rights hereunder, without the prior consent of the CORPORATION, in writing.

9. *Arbitration.* Any dispute under this agreement shall be settled by arbitration, pursuant to the rules, then in effect, of the American Arbitration Association.

10. *Benefit.* This agreement shall be binding upon CORPORATION, its successors and assigns, and PENN, their executors, administrators and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year above written.

461-8th AVENUE CORPORATION

By /s/ Simeon F. Gross, Pres.

PENN ASSOCIATES

By /s/ Herman J. Schectman (L.S.)

/s/ Sidney P. Schectman (L.S.)

/s/ John D. Bussel (L.S.)

/s/ Henry Spellman (L.S.)

/s/ George Zuckerman (L.S.)

General Partners